SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Since most of Hanover's contentions on this petition are anticipated in our main brief, reference is made in this reply only to assertions which demand further comment and to significant admissions.

### SUMMARY OF ARGUMENT

*Hanover Point I.* Contrary to Hanover's claim, a finding that the Government decree constituted an adjudication that leasing without selling ("lease-only") had been unlawful under the Sherman Act is essential to Hanover's recovery, as there is no other evidence of monopolization. Judge

Wyzanski made no such adjudication but carefully limited his determination of illegality to four specified lease clauses. Hanover's attempted distortion of his holding by ambiguous use of the phrase "lease-only policy" does not satisfy the requirements for *prima facie* status under Clayton Act § 5(a).

*Hanover Point II.* As to United's application for a certification to Judge Wyzanski, the ground of untimeliness which alone determined the Court of Appeals action is completely unsound in the circumstances as well as accomplishing grave injustice. There is ample authority for the certification procedure and the failure of the courts below to certify the crucial issue was an abuse of discretion in light of the conflicting decision of Judge Burke in *Coon* and Judge Wyzanski's statement that his own decision was misinterpreted by Judge Sheridan. In fact Judge Wyzanski's awareness of this Court's concern for eliminating conflicts prompted him to encourage United not only to request certification but to petition for certiorari if the Court of Appeals accepted Judge Sheridan's construction of the decree.

*Hanover Point III.* It is not disputed by Hanover that to warrant giving *prima facie* effect to the decree the "lease-only policy" of United must be shown to have been necessarily adjudicated to be illegal in the Government case. The legality of the lease-only policy (in the only proper meaning of a refusal to sell) was by no means adjudicated, indeed scarcely discussed in the basic Government case.

*Hanover Point IV.* As to target area Hanover stresses a privity concept which is quite irrelevant. The issue is whether Judge Wyzanski, on whose decree Hanover relies, found shoe manufacturers like Hanover to have sustained the direct anti-competitive impact of the illegality determined, and it is clear that he did not.

*Hanover Point V.* It is tacitly conceded that, assuming lease-only *per se* was found by Judge Wyzanski to be a crime, it would be improper to give such holding retroactive effect to the extent that it represented a change in the law and there was reliance on the earlier, different law. Hanover simply argues there was no change in the law and no reliance, an argument plainly refuted by *Alcoa, American Tobacco* and the earlier decisions of this Court dealing with the very business policy of United here in issue.

*Hanover Point VI.* Hanover does not deny that in 1955 it applied a test equivalent to cost of capital in deciding whether to lease or purchase United's machines. Hanover stresses that it made substantial purchases in 1955, without revealing that the purchases were of used machinery at substantial discounts and that the alternative would have involved lease charges substantially higher than those in effect during the period at bar.

*Hanover Point VII.* Against the findings that it neither demanded the right to purchase nor protested its inability to do so, Hanover rests on the concept of futility of demand. But there is no evidence that a demand would have been useless and the proof in fact shows that Hanover never failed to assert itself when it felt aggrieved and that it was quite content to continue leasing until after the Government decree. Elimination by the courts below of the requirement of a demand to sell in a suit based on alleged refusal to sell as a crime, is clearly erroneous.

*Hanover Point VIII.* Whether putative savings from a hypothetical purchase alternative should be trebled and awarded as damages where any dollar injury to Hanover was passed on to the purchasers of its shoes was not decided by Judge Goodrich, who dealt only with the stipulated assumption of excessive rentals which the courts below sub-

sequently rejected. By shifting the burden of any allegedly excessive payment to its purchasers Hanover lost its right to claim actual injury.

*Hanover Point IX.* As to limitations, the essential point, ignored by Hanover, is that the basis for the liability found is failure to sell, which admittedly existed at all times, i.e. both before and after the cut-off date for the bar of limitations. New causes of action thereafter cannot be accrued (contrary to the Court of Appeals holding) simply by United's entering into new leases at Hanover's request or collecting rentals lawfully called for by such leases. If the statute is to have any content it must run from the commencement of United's claimed refusal to sell.

## 1. WHAT THE GOVERNMENT SUIT DECIDED AND THE APPLICATION OF CLAYTON ACT § 5(a) (Hanover Points I and III)

While Hanover claims that "there was other substantial evidence of monopolization" besides the Government decree (br. 15), the evidence which Hanover summarizes by footnote goes solely to the issue whether United had monopoly power—not to the issue whether the policy of leasing without selling was an exclusionary monopolizing practice. Neither court below referred to any evidence apart from the Government decree that this policy was at all exclusionary. There is no such evidence in the record, nor has Hanover ever claimed there was. Thus the decree in the Government suit is the only record evidence which can be claimed to support the holding below that United's policy of leasing but not selling was a means of monopolization.[1]

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[1]Even if there were evidence in the record tending to show that this policy was a monopolizing practice, the holding that it constituted monopolization could not be affirmed on such evidence, since both courts below relied solely upon the Government decree.

The error or correctness of that holding is a vital and determinative issue on this appeal. Hanover's answer in its Points I and III to our argument as to the interpretation of the decree (our main br. 27-41) is vitiated by its persistent confusion in the use of the shorthand term "lease-only". We have used the term "lease-only" to denote a distribution by leasing exclusively which necessarily connotes the failure to sell.[2] That is, we have used "lease-only" to mean a leasing system which excluded sales, and have urged that the exclusion of sales was not in itself adjudged a violation in the Government suit.

Judge Wyzanski, when characterizing United's method of distribution with this feature in it, never picked out the absence of sales as a violation but always associated as the antitrust offenses the exclusionary elements of the leasing system—that is, those which kept competitors out. Thus, in what we believe to be his only use of the term "lease-only" Judge Wyzanski said:

> "Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges." (110 F. Supp. at 344, quoted at Hanover br. 19)

Elsewhere Judge Wyzanski also showed the four restrictive elements of the (exclusive) leasing system, rather than its concomitant absence of sales, to be the object of his concern:

> "If the matter were *res integra,* this Court would adopt the first approach, and, as a preliminary step to

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[2]One cannot say "refusal" to sell since there were no demands.

> ruling upon § 2, would hold that it is a restraint of trade under § 1 for a company having an overwhelming share of the market, to distribute its more important products only by leases *which have provisions* that go beyond assuring prompt, periodic payments of rentals, which are not terminable cheaply, which involve discrimination against competition, and which combine in one contract the right to use the product and to have it serviced. But this inferior court feels precluded from so deciding because of the overhanging shadows of United States v. United Shoe Machinery Co. of N. J., 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968, and United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, the Sherman and Clayton Act cases involving this company's predecessor and itself. . . ." (110 F. Supp. at 343; emphasis supplied)

What Hanover has to do in order to read the Government decree in its favor with the *prima facie* effect of Clayton Act § 5(a) is to show Judge Wyzanski's holding to be a flat condemnation of the failure to sell in itself. This it tries to accomplish by picking "lease-only" out of the language above quoted, stripping away the restrictive practices which were the object of Judge Wyzanski's concern, and employing it like a rubber stamp to convey the impression that condemnation of refusal to sell was the essence of the holding. This is done by the use of "lease-only" 15 times in Points I and III of the Hanover brief (including quotations).

Elsewhere Hanover describes the distribution policy held unlawful by Judge Wyzanski more correctly as the "lease-only policy as practiced" by United (br. 9, 16, 23, 24, 25). This focuses on the four restrictive lease provisions found by the court to be means of monopolization

(decree par. 4). It is United's "leasing system as practiced" which Government counsel attacked on the 1954 argument before this Court, as contrasted with leasing *per se* which they did not attack (our main br. 11-12).

Hanover's argument (br. 41) that

> "Lease-only gives full effect to the operation of the restrictive clauses and is the cement that binds together the violation"

is contradicted by the two crucial points of Judge Wyzanski's decision to which we have already called attention. One is the statement equating short leases with ownership as to lack of exclusionary impact (our main br. 30). The other is the statement that the antitrust laws are not designed to give a customer choice as to his supplier's selling method (our main br. 41). These two holdings are fatal to Hanover's argument.

It is of course true that the absence of sales is a part of the leasing practice, and it is this which Hanover claimed to be an injury to it. But the question before the Court is whether Judge Wyzanski in his decision, which is the cornerstone of Hanover's recovery, held distribution by leasing without alternative sales (i.e. lease-only) to be an antitrust violation, or whether on the other hand he limited his adjudication of violation to the restrictive practices condemned in decree par. 4. That the latter is clearly the case is shown by—

(i) the total absence in Judge Wyzanski's long opinion and decree of any statement that lease-only by itself was a violation.

(ii) his equating of short-term leases with ownership and his pointed observation that the antitrust laws are not designed chiefly, if at all, to give a customer choice as to his supplier's selling methods (our main br. 30, 41).

(iii) the breadth of the provision in the Government decree dismissing other charges on the merits, together with the Government's specification in its complaint of United's declination to sell as one of the offenses charged (our main br. 28-29). Hanover's labored argument that this dismissal also covered other charges (br. 22) does not remove par. 61 from the scope of the dismissal.

(iv) the statement by Government counsel, Mr. Timberg, on the closing argument before Judge Wyzanski that the relief the Government sought was not coextensive with any liability determined:

> "Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation." (A. 121).

(v) the declaration of Government counsel during the argument before this Court in 1954 that what they attacked was not leasing *per se* (what we call lease-only) but "this leasing system as practiced" (our main br. 11-12; Hanover br. app. 2a-3a).

(vi) the very plain intimation by Judge Wyzanski, when the Hanover problem was brought before him in 1965, that the Government never contended, and he (Judge Wyzanski) never ruled, as Judge Sheridan supposed the matter was decided (our main br. 19-21). Hanover's contemptuous reference to what Judge Wyzanski "did or did not have in the back of his mind . . . twelve years before" (br. 8-9) is a quite unfair presentation of the matter.

Hanover has no answer to these points. While it asserts that Judge Wyzanski "adjudicated the illegality of the policy", the "specific language" quoted for this assertion

(br. 18-20) contains no such adjudication. Moreover, Hanover omits any reference to the passages in which Judge Wyzanski carefully listed the aspects of United's leases which he found to be exclusionary, 110 F. Supp. at 297, 340, presumably because neither list includes lease-only. Nor has Hanover essayed any explanation why, if lease-only was held to be monopolization, par. 4 of the decree did not declare it to be a means of monopolization (see p. 28 of our main brief).

Significantly, Hanover has not attempted to suggest any reason why Judge Wyzanski might have found the lease-only policy to be an exclusionary monopolizing practice. Hanover has not even sought to defend the reasons suggested by the Court of Appeals—the psychological impact of leasing and the role of a second-hand market (discussed at pp. 31-32 of our main brief). Nor has Hanover attempted to meet the fact that the record in the Government suit contained no evidence to indicate that lease-only had an exclusionary impact in the absence of the four lease clauses found to be exclusionary.[8] (See p. 32 of our main brief.)

Hanover concedes (br. 23) that relief in a Government antitrust case must often "go beyond the limits of proven violation", but argues that Judge Wyzanski was not applying this rule when he enjoined lease-only for the future because the cases which did so "clearly recognized and made explicit that the relief ordered went beyond the violations charged", whereas Hanover says that Judge Wyzanski was not thus explicit. Hanover ignores the fact that the extensive discussion of the advisability of prohibiting

[8]The only contention made by the Government at the close of the evidence with respect to United's leases was that the four allegedly exclusionary clauses constituted monopolization. The Government's Requests for Findings of Fact and Conclusions of Law, pp. 581-94, confined themselves to these four clauses.

lease-only for the future, from which the last of its three lengthy quotations at br. 18-20 is drawn, is found not in the section of the opinion on Alleged Violations (as Hanover incorrectly states at br. 18) but rather in the *Opinion on Remedy*. The fact that the provision of the decree barring lease-only for the future went beyond the violations found by Judge Wyzanski also appears from his careful weighing of the wisdom and fairness of such a provision in his Opinion on Remedy. If lease-only had been found in itself to be a violation of the antitrust laws, it would have been summarily enjoined without discussion. Instead of carefully considering in his Opinion on Remedy United's contention that such a provision in the decree would discriminate against United and in favor of other shoe machinery manufacturers, as he did at 110 F. Supp. 350, Judge Wyzanski would simply have declared lease-only a violation of law.

In view of the previously existing interpretation of the Sherman Act, however, and United's prior judicial record lease-only could not have been declared a Sherman Act violation for the period preceding the Government decree for constitutional reasons. The Constitution in Article I, § 9(3) forbids Congress to pass *ex post facto* laws. While this prohibition is apparently not applicable to the judiciary (*James* v. *United States* 366 US 213, 247-48 [Harlan, *J.*, dissenting in part]; *United States* v. *Harriss* 347 US 612, 635 [Jackson, *J.*, dissenting]; cf. *Ross* v. *Oregon* 227 US 150, 161), the re-interpretation by the courts of an existing Act of Congress so as to make criminal that which previously had been construed as lawful would draw in question the constitutional rule against *ex post facto* lawmaking. Cf. *James* v. *United States* 366 US 213, 221, holding that an income tax declaration conforming to the statute as construed by this Court lacks the necessary ele-

ment of willfulness to sustain a conviction upon a change in the law by the overruling of such construction. Sherman Act § 2 makes monopolization a crime. While the question of intent in respect of monopolizing was resolved by Judge Wyzanski on the principle that defendant, having willed the means, had willed the end (110 F. Supp. 346), this reasoning would support only injunctive relief. It would not suffice to turn into a crime that which was not a crime before the decision. That Judge Wyzanski realized this is further shown by his comment on the developing construction of the Sherman Act in *United States* v. *Grinnell Corp.* 236 F. Supp. 244, 247-8 (D. R. I. 1964), aff'd 384 US 563.

We conclude that in the case at bar Judge Wyzanski could not have intended to denounce lease-only as a crime in the period preceding his decision, even though he prohibited it for the future (decree par. 5, 110 F. Supp. at 352). Thus Hanover has utterly failed to show, as admittedly it must (our main br. 38-41; Hanover br. 31-32), that the unlawfulness of lease-only was a necessary implication therefrom.

**2. FAILURE TO CERTIFY THE QUESTION OF WHAT THE GOVERNMENT DECREE DECIDED (Hanover-Point II)**

Surely the greater the doubts as to whether lease-only was itself held by Judge Wyzanski to constitute monopolization, the more vital was direct reference of the question to him in accordance with the procedure which Judge Wyzanski himself suggested (A. 138).

Hanover argues (br. 26-28) that United's motion for certification would have been timely only if made "at an early stage in proceedings before the" Middle District of Pennsylvania (p. 26), without attempting a serious answer to the point that it could not then be determined whether the

interpretation of the Government decree would prove decisive (see our main br. 36-37). Hanover's contention that absence of a Federal statute or rule on certification is fatal (br. 26-27, 30) is refuted by this Court's certification of state-law questions to state courts without invoking any Federal statute or rule (see our main br. p. 35); and analogy may also be drawn to the Court's holding before the passage of 28 USC § 1404(a) that Federal courts had inherent power to compel the bringing of an action in another forum under the doctrine of *forum non conveniens* although no Federal statute or rule provided for such a procedure. *Gulf Oil Corp.* v. *Gilbert* 330 US 501.

The attempt to dismiss the earlier, conflicting *Coon* case as a mere "failure of proof by a bankrupt plaintiff" (br. 25, 29-30) beclouds the truth. District Judge Harold P. Burke specifically held that:

> "2. Any acts of the defendant held by the court in United States vs. United Shoe Machinery Corp. to be in violation of the antitrust laws were not the proximate cause of any injury to the business or property of W. B. Coon"

and that

> "6. Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal." (A. 273)

This ruling was exactly in point on the question of law identical in the two cases, viz., the relationship of the Government decree to the treble damage complaint. The decree was the same, and the complaints were identical in all material respects (compare A. 5-20 with A. 252-66). Talk about the bankruptcy of the plaintiff Coon or the scope of the proof is obfuscation.

Hanover's recitation (br. 29) that a "search" of the colloquy between counsel and Judge Wyzanski revealed to Judge Sheridan nothing to cause him to change his construction of the Government decree flies in the face of Judge Wyzanski's plain statement that "the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided". (A. 142) The conflict cried out for resolution and it is little wonder that, while on comity grounds he refused formally to intrude his views (A. 148-50), Judge Wyzanski saw fit to add:

> "There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari." (A. 149)

**3. DIRECTNESS OF ANTI-COMPETITIVE IMPACT (Hanover Point IV)**

Contrary to Hanover's suggestion at br. 1-2 and 33, the target-area issue is "fairly comprised" within Question Presented No. 1 (our main br. 3) and in fact the very same point was argued by United in the Court of Appeals under a similar "question presented" (Appellant's Brief pp. 1, 13-28).

In its target-area argument Hanover repeatedly dwells upon its "direct business relationship" with United (br. 34-35), as though the issue were whether it stood in privity with United. That is not the point. The real issue is whether Hanover was one of those found by Judge Wyzanski to have sustained the direct anti-competitive impact of the violations he found. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ABA Anti-

trust L. J. 5, 16-19 (1966). Perhaps recognizing this, Hanover attempts to demonstrate that it was a target of the violations Judge Wyzanski found; but it ignores Judge Wyzanski's explicit statement that

> "For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products." 110 F. Supp. at 349-50, quoted at our main br. 41.

In toiling over this problem of impact, the courts below have been extraordinarily blind to the simple, admitted facts of the case at bar. For instance, the district court was able to conclude that "Hanover was 'aimed' at and 'hit' " (245 F. Supp. at 275, A. 54) in flat disregard of the statement of Hanover's President Sheppard that he was satisfied with the leasing system (p. 19 below).

**4. RETROACTIVE APPLICATION OF GOVERNMENT DECREE (Hanover Point V)**

Again, as in its brief in No. 335, Hanover does not appear to contend for retroactivity *if* there was a change in the law and reliance on the prior law. Hanover nails its colors to the proposition (br. 41-42, 53) that there has been no change in the law and adds (br. 42) that there was no showing of reliance by United on any different earlier law.

Hanover attributes to United (br. 41) the argument that "due to this claimed earlier approval" of United's leases by this Court the decisions in *Alcoa* and *American Tobacco* did not put United on warning. The fact is that, while the prior judicial approval of United's leases gave it a unique position as regards change in the law, even in

the absence of such approval *Alcoa* and *American Tobacco* would not have put United on notice. The Court will note that, even after and in the light of Judge Wyzanski's findings, the Middle District of Pennsylvania did not impose liability in respect of the leases, accepting their lawfulness and the reasonableness of the rentals (245 F. Supp. at 275-76, A. 55-58). Liability was based on the wholly novel idea that the lessee was entitled to a purchase alternative which neither it nor any other customer demanded, and that the saving indicated by comparing the aggregate reasonable rentals with a constructed purchase price could be treated as damages reflecting "injury" to the previously satisfied customer. Nothing in *Alcoa* or *American Tobacco* gave warning of such an innovation.

The charge (br. 38-39) of misleading quotation from Mr. Justice McKenna in the 1918 case, 247 US 32, 63, is answered by simply reading the full quotation in the footnote on page 39 of Hanover's brief. Moreover, the pages of his opinion following the quotation make it clear that Mr. Justice McKenna was concerned with whether the leases were an illegal restraint, not with whether such a restraint was the purpose for which United was organized. This is most evident from the conclusion of the discussion of leases, 247 US at 66:

> "However, we need not dwell further upon the leases. It approaches declamation to say that the lessees were coerced to their making. . . . There is no question in the case of the use of circumstances to compel or restrain . . . ."

Hanover claims to be "unable to follow" the point that approval of such clauses of United's leases as the full capacity clause, which this Court upheld in the 1918 case, necessarily implies approval of the lease-only policy (br. 39-40). The point is self-evident: if lease-only were

monopolization, lease-only plus lease clauses would *a fortiori* be monopolization; therefore this Court's holding in the 1918 case that lease-only plus the lease clauses there involved was not monopolization necessarily comprehends the holding that lease-only was not monopolization. It was especially in light of this Court's earlier *United* decisions that the Court of Appeals, like Judge Wyzanski, found in *Alcoa* and *American Tobacco* a clear change in the law (377 F. 2d at 787-90, A. 204-09).

As to Hanover's argument that "there is no claim in this record of reliance by United on counsel" (br. 42), the Court of Appeals held that "it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct" (377 F. 2d at 789, A. 207). That finding of reliance coincides with the conclusion recently expressed by Judge Schaefer:

> "To inject into every case an added requirement that individual reliance be proved, would seriously complicate the judicial process. Our legal system operates generally upon an assumption of knowledge of the law, and in most of the cases in which the issue arises, reliance seems obvious." *The Control of "Sunbursts": Techniques of Prospective Overruling*, 22 N. Y. City Bar Assn. Record 394, 407 (1967).

**5. COST OF CAPITAL (Hanover Point VI)**

Nowhere is there even an attempt to answer the point that Hanover in 1955 applied a test equivalent to cost of capital in deciding whether to lease or purchase machines

from United (our main br. 55-56, 61).[4] The finding stressed by Hanover (br. 45) that it "would have purchased" is meaningless even if it is a finding[5], since it is based on an erroneous legal standard ignoring cost of capital. Hanover's expert Dr. Cyert freely conceded that a calculation using cost of capital "is perfectly proper as an aid to decision-making" (A. 546, 562), i.e. at the times Hanover would have had to decide whether to purchase or lease.

The "substantial purchases" of used machinery in 1955 which Hanover stresses (br. 5, 45) are without probative value for two reasons. *First*, the alternative to purchasing this used machinery in 1955 was payment of the newly instituted Form B lease charges (see A. 649-50), which were substantially higher than the Form A lease charges in effect throughout the period involved in this case (for example, 32% higher for one group of machines leased by Hanover,

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[4]The statement at p. 55 of our main brief that the "recoupment period is the exact reciprocal of the return to Hanover of its investment in the machine" requires a minor correction to be completely accurate. Since the savings expected in future years must be discounted by the cost of capital to arrive at their present worth to Hanover, the actual return is somewhat less than the reciprocal of the recoupment period. Anthony, *Shoe Machinery: Buy or Lease?*, at 19-23 (Rev. ed. 1955). This adjustment, however, does not affect the vital fact that the recoupment period method used by Hanover is almost exactly equivalent to the cost of capital method, both being determined by the same considerations.

[5]The statement of the District Court, which the Court of Appeals treats as a finding, that "Hanover . . . was unable to purchase most of the important machines which it would have purchased had they been available" (377 F. 2d at 781, A. 189, quoted at br. 45) is *not* a finding that Hanover would have purchased most of the more important machines. By virtue of the structure of the sentence, it is merely a statement that Hanover could not buy those of the machines that it would have bought. The controlling and only finding of the District Court about Hanover's possible purchase in the damage period is: "Hanover need not show that in any and all cases it would have purchased, but that it *likely* would have purchased the machines." (245 F. Supp. at 280, A. 66; emphasis supplied)

Def. Ex. 33 [admitted R. 548], p. 44). *Second,* the used machinery purchases of 1955 were induced by the abnormally favorable discounts made available by the Plan for Terminating Form A Leases, which provided reductions of 12% to 85% from the purchase price new for the used machinery involved.[6]

Judge Burke's dismissal of the parallel claims of the plaintiff in the *Coon* case was based upon the finding, among others (A. 271), that there was "no evidence of the cost of capital or required return on investment to W. B. Coon Co. if the said company had used its own funds to purchase machines held on lease."

**6. ABSENCE OF DEMAND (Hanover Point VH)**

The Court of Appeals noted that the trial court had found that Hanover never asked United to sell the machines nor protested its inability to buy them from United. Hanover does not contest these findings. It emphasizes however (br. 48) the trial court's further finding, also noted by the Court of Appeals, that Mr. Sheppard testified that any request to buy would have been a "foolish question", which "explanation" the trial court thought not unreasonable "in view of the findings in the Government case and the evidence in this case" (245 F. Supp. at 280, A. 66; 377 F. 2d at 781, A. 190). The Court of Appeals said that what Mr. Sheppard characterized as foolish "amounts to a futile gesture which the law does not require" (377 F. 2d at 781, A. 190).

Thus it is *admitted* that no demand was made to exercise the right on the deprivation of which enormous damages have been built. The attempt is to excuse demand for futility. But there is no evidence in the record that a demand

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[6]The discount table is set forth on the last page of the Plan for Terminating Form A Leases, Def. Ex. 35 [admitted R. 392]. A copy of this page is attached as Appendix A to this brief.

would have been useless. Aside from quoting the self-serving and unresponsive counter-question of Hanover's President about a "foolish question" (our main br. 59, n. 14), both the trial court and the Court of Appeals confine themselves to editorial comment on the findings of Judge Wyzanski. But that judge in summarizing 14,000 pages of record did not find that a demand to buy would have been futile. He found, with repeated descriptive detail, that all lessees were satisfied to lease, rather than to purchase, their machinery.[7] Mr. Sheppard, President of Hanover, expressed to United's attorneys willingness to testify on behalf of United in the Government suit (A. 340). When asked at an interview in 1950 whether he objected to leasing machines from United, Sheppard said:

> "The only objection I have to leasing is the fact that you lease to everybody." (A. 341)

He protested against United's practice of assisting the local chamber of commerce to set up new plants inasmuch as

> ". . . by giving them the machinery it would allow fly-by-night outfits to come in here and upset his [Sheppard's] labor market." (*Ibid.*)

Mr. Sheppard was not at all timid in the assertion of his rights. So far from belonging to what the trial court, in its poetic phrase quite unsupported by the record, called "captive customers of United" (245 F. Supp. at 280, A. 66), he was vigorously independent. When United took a position about the coverage of its leases with which Sheppard disagreed, he refused to sign the disputed lease and

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[7] We again refer to the testimony in the record formerly before this Court as to the complete satisfaction with the leasing system of every witness who appeared in the Government antitrust case (our main br. 14). The court was convinced of the lessees' "long-term, satisfactory relations with United" (110 F. Supp. at 344).

"was successful in his fight with United" (Chester Ward at A. 341; Sheppard at A. 309-10).

If therefore the scattered comments of the courts below about "captive customers" as being tantamount to futility of demand do constitute "findings", on the entire evidence they are clearly erroneous.

In a glancing way Hanover tries to give the impression that the trade association effort, in which it participated, to persuade United to offer more of its machinery for sale, an effort represented by certain correspondence exchanged toward the end of 1950 (Pl. Ex. 24 and 25 [admitted A. 479-80], A. 609-18), either was a demand or showed futility of demand. The exact opposite is the case, and the Court's attention is invited to this correspondence and its sequel. It shows that the National Shoe Manufacturers Association, by a committee of which Hanover's President Sheppard was a member, did *not* request the purchase of any particular machines, but only asked for consultation "with a view to selecting certain machines" then offered on a lease basis only and putting them on a basis of optional lease or purchase (A. 613).[8]

If a request to buy was a "futile gesture" as the Court of Appeals said, the nine experienced members of the NSMA Committee certainly did not know it.

United, rather than repudiate the NSMA request, merely asked in effect for a postponement of the discussion until the pending Government antitrust suit was completed (A. 616). So far as the record shows, this was the end of the matter. The NSMA committee requested a discussion and were satisfied with its postponement. They made no demand, they asserted no rights of purchase, they made no

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[8]We again call attention to the fact that out of the existing list of optional terms machines, which before 1955 were the less important ones, Hanover voluntarily elected *to lease rather than purchase 136* (our main br. 5-6).

proclamations of antitrust violation even though they knew the Government was charging monopolization.

The committee's acceptance of the situation goes even further. Charles H. Jones, Jr., chairman of the committee of nine including Mr. Sheppard (A. 615), testified that the committee could not agree on the list of machines to be selected for optional purchase. The committee's secretary, W. W. Stephenson, urged its members to make a list of machines which their companies desired to purchase (A. 608), but the chairman testified that no such list was ever made. Differences arose between the larger and the smaller companies as to what would be desirable for the industry as a whole, and as to the smaller manufacturers Mr. Stephenson felt "there would be a question of the desirability of how many machines or how broad they would wish to have the choice of lease or purchase at the option of the individual company".[9]

Relevant to this NSMA negotiation and the absence of demand is the finding of Judge Burke in the *Coon* case (A. 269-70), after examining Judge Wyzanski's findings in the Government suit and reviewing the advantages to shoe manufacturers of the leasing system:

> "12. There is no evidence that W. B. Coon Co. *or any other shoe manufacturer* was dissatisfied with the defendant's leasing system in effect up to February 18, 1953, the date of the decree in United States vs. United Shoe Machinery Corp. . . . ." (Emphasis supplied.)

This finding is reinforced by Defendant's Exhibit 73 [admitted R. 1905] (facing A. 672) demonstrating the extent

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[9]Testimony of Charles H. Jones, Jr. at R. 1707. This testimony is not reproduced in the joint appendix, and R. 1702-08 are therefore reprinted as Appendix B to this brief.

to which Hanover took advantage of its right under the leases to return machines which became obsolete or unnecessary during the period 1946-55. Hanover's President named four factors of disadvantage which made him selective in new machinery purchases, including fear of obsolescence (A. 320-22).

Hanover was one of the mass of satisfied lessees. It was in exactly the position of the plaintiffs in the film cases which Hanover at br. 52 unsuccessfully tries to distinguish (our main br. 59-60, n. 15). Just as the theatre owners who had second-run films were obliged to make overt demand for first-run films as a prerequisite to suit, so Hanover as a satisfied lessee could not legally complain without having stated its demand to buy specific machines.

The absence of demand by Hanover in the damage period was impelled by the solid advantages of the leasing system. For this and the other reasons stated at pp. 58-60 of our main brief, the demand requirement is an important and functional step in litigation like the present. It should not be fudged off as a mere formality. It is not the "rigid or mechanical formula" which this Court deprecated in its discussion of the special facts of the *Continental Ore* case, 370 US at 699. In the context of this case a demand by Hanover to purchase United's machines is required in the interest of fairness. To dispense with the demand requirement is to turn Hanover's utilization of the leasing system and its expressions of satisfaction therewith into a form of entrapment.

**7. PASSING-ON OF LEASE COSTS (Hanover Point VIII)**

Hanover's reliance, like that of the courts below, is on rulings of the late Circuit Judge Goodrich (br. 54) which have turned out to be dictum as the case actually developed. His decision was on a preliminary trial and on stated as-

sumptions which he phrased as "excessive rentals for the use of shoe machinery" (185 F. Supp. at 828; cf. App. 1960 p. 25a). Upon the trial this claim of excessiveness was rejected by the District Court, and the basis of liability transferred to the quite different idea of a substituted constructed purchase price to be contrasted with the entire aggregate of annual lease payments. Hence Judge Goodrich's language related to a damage theory which is now out of the case, although Hanover hints the contrary (br. 6) on the basis of what the complaint asserted rather than the issue actually framed for preliminary trial.

This Court has not dealt with the passing-on question since its decision on an antitrust formulation of a rate overcharge in the *Keogh* case, 260 US 156, 165 (1922). Conflicting decisions in various courts of appeal arising from private antitrust cases have failed of certiorari.[10] The question is now ripe for resolution, and it is submitted that the proper rationale is that set forth in *Anniston Mfg. Co.* v. *Davis* 301 US 337, 348, that if plaintiff "has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury . . . ." The present state of the law, whereby the passing-on defense is available if plaintiff is a "middleman" but not if he is a "consumer" (our main br. 64), reflects an ambivalence in treatment of the single word "injury" in Clayton Act § 4 which it is submitted this Court should not sanction.

**8. LIMITATIONS (Hanover Point IX).**

Hanover's answer to the statute of limitations defense, as urged at pp. 66-71 of our main brief, is simply to reiterate the "continuing monopolization" theory of the courts

[10]Our main br. 63-5. Of the eight cases from *Chattanooga* to *American Crystal Sugar* cited by Hanover at br. 56-57, in only one (*Straus*) was the passing-on question even mentioned.

below (br. 60-61). This misses the point that the basic liability underlying the award of damages is claimed refusal to sell. Hanover itself acknowledges that United's policy was the same in 1939 and in all subsequent years (br. 53). In No. 335 Hanover treats United's "monopolistic and exclusionary acts" as being "the same before and after June 10, 1946" (br. in No. 335 pp. 24, 27).

Clearly the very nature of the liability asserted demands application of the rule that limitations begin to run from the date on which plaintiff first could bring action (our main br. 68). This rule is not to be burked or aborted by the mere continuance of the practices charged, since the effect would be to repeal the statute of limitations. Yet Congress in recent years has manifested its concern with the protracted pendency of private antitrust claims by establishing in 1955 a four-year limitation, with the statement in the House and Senate reports that

> ". . . the committee . . . does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws."[11]

Sound public policy requires that litigants claiming injury be put on notice of their duty to enforce their rights promptly. Dalliance and delay should be discouraged on both private and public grounds. It is incompatible with the function of private litigants in enforcing the antitrust laws that they be allowed to postpone with impunity the prosecution of claimed wrongs which, in Hanover's admission, were identical before and during the damage period.

The Court of Appeals in dealing with this point excused Hanover's delay on the ground that the conduct of United

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[11] H. R. Rep. No. 422, 84th Cong., 1st Sess. 9 (1955); S. Rep. No. 619, 84th Cong., 1st Sess. 6 (1955).

which is penalized is not the mere re-assertion of the refusal to sell but consists of the collection of rentals on leases and entering into new leases (377 F. 2d at 794, A. 221). We have already shown that this is an indefensible ground for evading the statute (our main brief pp. 69-70), and Hanover in its brief of December 22 1967 does not attempt to defend it.

Since the leases were lawful and the rentals reasonable, the Court of Appeals' ground for treating the post-1946 leases as a violation of the antitrust law is entirely inconsistent not only with Hanover's theory of monopolization but with the teaching of this Court in *Bruce's Juices, Inc.* v. *American Can Co.* 330 US 743, 755.

The portion of the Court of Appeals opinion quoted by Hanover at br. 61, comparing "repeated and measurable invasion of a plaintiff's rights . . . both outside the statutory period and also within it" (377 F. 2d at 795, A. 221), exposes the extreme artificiality of the reasoning below. In the period under review no perceptible "invasion" of Hanover's rights occurred. Dealings between the parties on a lease basis proceeded without a murmur of protest. Machines were returned, repair services utilized, replacements made in the regular flow of business. These have no bearing on refusal to sell, the assumed violation. They could not in any event amount to more than the re-assertion of refusal to sell which the Court of Appeals acknowledged insufficient to accrue a new cause of action (377 F. 2d at 794, A. 220).[12]

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[12]A summary judgment for the defendants in the *Peto* case, cited in our main br. 71, n. 22, has been affirmed *per curiam* in 384 F. 2d 682 (CA 2 1967), petition for cert. filed, No. 1121, Oct. Term 1967, 36 U. S. L. Week 3323 (Feb. 15 1968).

## CONCLUSION

Hanover repeats in its Conclusion the improper requests for relief to which we replied at pp. 26-29 of our brief in No. 335, and only the novel assertion by Hanover (br. 7) that its "theory of damages [was] accepted by both courts below" requires further answer.

United raised serious issues as to the validity of Hanover's damage calculations which the Court of Appeals found not "possible to adjudicate . . . on the present record" in view of the retrial which that court directed on damages, 377 F. 2d at 791, A. 212. United challenged, for example, Hanover's amazing assumption that it could have disposed of its used machines for a salvage value ($1,226,801, A. 668) equal to almost two-thirds of the *total net cost of leasing* as computed by Hanover ($1,863,680, A. 664). Again, United pointed out that Hanover's damage calculations included numerous machines which it leased solely because they could easily be returned if they became unnecessary or obsolete, and which it would not have purchased (see A. 323). As these and other substantial issues raised by Hanover's damage calculations have not been considered by the Court of Appeals, Hanover cannot properly assert that its calculations have been accepted by both courts below.

As stated in our main brief, pp. 71-72, this action should be dismissed or, on the certification and cost of capital points, remanded to the Court of Appeals for the guidance of the District Court.

Respectfully submitted,

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